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Court of the United States

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No. [redacted]

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[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

MARYLAND CASUALTY COMPANY, ET AL.,
PETITIONERS,

vs.

GERTRUDE PICARD CUSHING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 3, 1952.

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

No. 883, Civil Action

GERTRUDE PICARD CUSHING, Individually, as Administratrix of the succession of TIMOTHY CUSHING, and on behalf of her minor son, TIMOTHY CUSHING, JR.,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 885, Civil Action

LUCILLE E. WELDEN, Individually, as Administratrix of the estate of WILLIAM R. WELDEN, and on behalf of her minor children, MARY L. WELDEN and WILLIAM R. WELDEN, II,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 886, Civil Action

MRS. JEAN D. RANDOLPH, Widow of RUSSELL R. RANDOLPH, Individually, and as Executrix of His Estate,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 887, Civil Action

MRS. MONETTE M. LYNCH, Individually, and as Administratrix of the Succession of HAROLD LYNCH,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

[fol. 1a] No. 888, Civil Action

MRS. A. W. ASHLEY, and MRS. ELIZABETH ASHLEY WORTHEN, Individually, and as Co-Administratrices of the Succession of FLOYD L. ASHLEY,

VS.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

APPEARANCES

MESSRS. BROWNE & RAULT, GERARD A. RAULT, ESQ.,
Attorneys for Mrs. Jean D. Randolph
JAMES J. MORRISON, ESQ.,
Attorney for Gertrude Picard Cushing
ARTHUR A. DE LA HOUSSAYE, ESQ.,
Attorney for Lucille E. Welden
RAYMOND H. KIERR, ESQ.,
Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.
MESSRS. BREAZEALE, SACHSE, WILSON & HERBERT, H. PAYNE BREAZEALE, ESQ.,
Attorneys for Texas & Pacific Railway Company
MESSRS. DEUTSCH, KERRIGAN & STILES, EBERHARD P. DEUTSCH and RENE H. HIMEL, JR., ESQS.,
Attorneys for The Home Insurance Company of New York and Maryland Casualty Company

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 20th day of September, 1951, at the City of New Orleans, Louisiana.

Extension of Time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including November 26th, 1951.

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[fol. 2] COMPLAINT—Filed May 18, 1951

To the honorable the judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division:

1

Plaintiff, Mrs. Jean D. Randolph, widow of Russell R. Randolph and executrix of his estate, is a citizen of the State of Kentucky. Defendants are corporations created under the laws of a state or states other than the states of Kentucky or Louisiana but are authorized to do business and are actually doing business in the Eastern District of Louisiana. The amount in controversy, exclusive of costs and interest, exceeds the sum of $3,000.00. Jurisdiction and right of action against Maryland Casualty Co. and Home Insurance Co. of New York is also based under the provisions of 41 Stat 1007, as amended, popularly known as the Jones Act. (46 U.S.C. 688)

2

Defendant, Texas & Pacific Railway Company, is the owner and operator of a railroad draw bridge which crosses the Atchafalaya River near Melville, Louisiana, which said bridge was struck on May 19, 1950 by the tow boat JANE SMITH and her tow as hereinafter alleged.

3

Defendants, Maryland Casualty Co. and Home Insurance Co. of New York, are the liability insurance under-[fol. 3] writers of the tow boat JANE SMITH and of Charles C. Smith, as owner, and Oil Transport Company, Inc., as charterer, under policies of liability insurance issued and/or delivered in the State of Louisiana, which said policies cover the injury and death which are the subject of this complaint and as such said corporations are liable to this direct action under the provisions of Louisiana Revised Statutes 22:655 et seq.

4

During all the times referred to herein Oil Transport Company, Inc. was the charterer and operator and Charles C. Smith was the owner of the tow boat JANE SMITH used

in the transportation of freight for hire by water in interstate commerce.

5

During the month of May 1950, Russell R. Randolph, husband of plaintiff, was employed as an officer and member of the crew of the tow boat JANE SMITH, and, at all times to referred to herein, was serving aboard said tow boat in that capacity.

6

At about 9:00 P.M., May 19, 1950, the said tow boat JANE SMITH and her tow were proceeding in the Atchafalaya River and were approaching the draw bridge hereinabove referred to owned by defendant corporation, Texas & Pacific Railway Company. At this time petitioner's late [fol. 4] husband, Russell R. Randolph, was off duty and in the galley of said tow boat.

7

At approximately 9:00 P.M., May 19, 1950 or a few minutes thereafter the said JANE SMITH, in attempting to enter the pass through the span of said bridge, collided with a concrete pier of the draw span of said bridge and capsized, trapping and drowning the said Russell R. Randolph.

8

Plaintiff avers that nothing the said Russell R. Randolph did or omitted to do caused or contributed to said accident, but that said accident was caused by the gross negligence of defendant railroad or in the alternative, by the gross negligence of the owner of said tow boat, the assured of defendant insurance companies; or in the alternative, by the negligence of Oil Transport Company, Inc., also the assured of defendant insurance companies; or in the alternative, by the joint negligence of the defendent railroad company and/or the owner of said tow boat, JANE SMITH, and/or the charterer of the tow boat JANE SMITH.

9

Plaintiff avers that she was totally dependent upon her late husband and that by his death she has not only suf-

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fered the loss of her financial support, but has been deprived of the loving care, comfort and affection of her said husband, and has endured, because of his death and because [fol. 5] of the delayed finding of his body, great mental pain and suffering, all to her damage in the sum of $150,000.00.

Wherefore, plaintiff demands a trial by jury and judgment against defendant, Texas & Pacific Railway Company, in the sum of $150,000.00 together with interest and costs; or in the alternative judgment against defendant corporations, Maryland Casualty Co. and Home Insurance Co. of New York, in the sum of $150,000.00 together with interest and costs; or in the further alternative against all of the said defendants jointly, severally, and insolido in the full sum of $150,000.00 together with interest and costs.

Browne & Rault, Attorneys for Plaintiff; by (S.) Gerard A. Rault, 1701 American Bank Building, New Orleans, Louisiana.

Serve all defendants through the Secretary of State of Louisiana.

In United States District Court

Motion to Consolidate—Filed June 22, 1951

Defendants Maryland Casualty Company and Home Insurance Company of New York appear herein solely and specially for the purposes of the following motions, without in any way waiving or abandoning, but on the contrary expressly reserving, any and all pleas and defenses of whatever nature which they have or may have to the above captioned action, and particularly without acknowledging [fol. 6] or acquiescing in this court's jurisdiction of said action but expressly reserving their pleas to the jurisdiction.

Suggesting to the court that in re Oil Transport Company Inc., No. 508 in Admiralty, Eastern District of Louisiana, Baton Rouge Division, and in re Charles C. Smith, No. 512 in Admiralty, Eastern District of Louisiana, Baton Rouge Division, consolidated proceedings for limitation of liability,

which concern the events at issue in the above-captioned action, are now pending, and that plaintiff in the above-captioned action has filed claims, based on the alleged cause asserted in the above-captioned action, in said limitation proceedings:

Defendants Maryland Casualty Company and Home Insurance Company of New York move the court, with the annexed affidavits for an order consolidating with the above-captioned action those of Gertrude Picard Cushing vs. Texas & Pacific Railway Company, et al., Civil Action No. 883, Eastern District of Louisiana, Baton Rouge Division; Lucille E. Welden vs. Texas & Pacific Railway Company, et al., Civil Action No. 885, Eastern District of Louisiana, Baton Rouge Division; Mrs. Monette M. Lynch vs. Texas & Pacific Railway Company et al., Civil Action No. 887, Eastern District of Louisiana, Baton Rouge Division; and Mrs. A. W. Ashley et al. vs. Texas & Pacific Railway Company, et al., Civil Action No. 888, Eastern District of Louisiana, Baton Rouge Division, on the ground that all of said actions involve common questions of law and fact and [fol. 7] that consolidation will avoid expense, delay and confusion. Said defendants file herewith a memorandum of authorities in support hereof and of the motions to consolidate filed in said companion actions.

Said defendants further move the court for an order extending their time, within which to file defensive pleadings in the above-captioned action, for a period of twenty days following disposition of the foregoing motion.

(S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Maryland Casualty Company and Home Insurance Company of New York.

To: James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Messrs. Browne & Rault, Attorneys for Mrs. Jean D. Dandolph; Raymond H. Kierr, Esq., Attorney for Mrs. A. W. Ashley, et al., and for Mrs. Monette M. Lynch; Arthur A. Delahoussaye, Esq., Attorney for Lucille E. Welden; Messrs. Breazeale, Sachse, Wilson & Hebert, Attorneys for Texas & Pacific Railway Company.

Please take notice that the foregoing motions will be brought on for hearing before the United States District

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Court at the Postoffice Building in New Orleans on Wednesday, June 27, 1951, at ten o'clock A.M.

(S.) Eberhard P. Deutsch.

[fol. 8] I certify that copies of the foregoing motions and notice of the annexexd affidavits, and of the memorandum of authorities filed in support of the motions, have been served on the attorneys to whom the notice is addressed.

(S.) Rene H. Himel, Jr.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO CONSOLIDATE—June 27, 1951

This cause came on this day to be heard on motion of defendants, Maryland Casualty Company and Home Insurance Company of New York to consolidate.

Present: E. Deutsch, Esq., Attorney for Maryland Cas. Co. and Home Ins. Co. of N.Y.; Payne Breazeale, Esq., Attorney for T. & P.; James J. Morrison, Esq., Attorney for Plaintiffs.

There being no objection:

It is ordered that the motion of defendants, Maryland Casualty Company and Home Insurance Company of New York to consolidate be, and the same is hereby, granted. Counsel for defendants are allowed 20 days to file extension of time to plead.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT—Filed July 10, 1951

Defendants Maryland Casualty Company and Home Insurance Company of New York move the Court, with the annexed supporting affidavits and attached exhibits, to dismiss the within actions as to movers, and for summary judgment in each of said actions, on the grounds that

1. The court lacks jurisdiction of said actions against movers;

2. The complaints in said actions fail to state claims against movers upon which relief can be granted, because

A—Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 does not, and cannot constitutionally, apply to the policies of marine insurance in suit, or to the instant alleged maritime causes;

B—Plaintiffs are seeking to enforce directly against movers in the within actions, claims as against which movers' assureds have initiated in this court, proceedings for exoneration from, or limitation of, liability.

Defendants Maryland Casualty Company and Home Insurance Company of New York further move the court to enter a finding that there is no just cause for delay in the entry of the orders and judgments herewith demanded, and to direct that final judgments be entered in favor of movers, dismissing them from the within actions.

(S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Movers.

[fol. 10] To: Messrs. Browne & Rault, Attorneys for Mrs. Jean D. Randolph; James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Arthur A. de la Houssaye, Esq., Attorney for Lucille E. Welden; Raymond H. Kierr, Esq., Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.; Messrs. Breazeale, Sachse, Wilson & Hebert, Attorneys for Texas & Pacific Railway Company.

Please take notice that the foregoing motions will be brought on for hearing before the United States District Court at the Post Office Building, New Orleans, on Wednesday, July 18, 1951, at 10:00 o'clock A.M.

(S.) Eberhard P. Deutsch.

Certificate

I certify that copies of the foregoing motions and notice, and of the memorandum of authorities filed in support of the motions, have been served on counsel for plaintiffs and for defendant Texas & Pacific Railway Company.

(S.) Rene H. Himel, Jr.

New Orleans,
July 9, 1951.

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AFFIDAVIT OF ANDREW M. DOYLE, JR.—IN SUPPORT OF MOTION
STATE OF LOUISIANA,

Parish of Orleans:

Before me, the undersigned authority, personally ap-
[fol. 11] peared ANDREW M. DOYLE, JR., who, being duly sworn, deposed that:

He is assistant manager of the New Orleans Claim Division of defendant Maryland Casualty Company. Attached hereto is a true copy of said defendant's Standard Workmen's Compensation and Employers' Liability Policy No. 01-493468, issued to Oil Transport Company, Inc., et al., which was the sole insurance policy of said defendant, in effect during May, 1950, covering liability as to members of the crew of the Towboat Jane Smith.

(S.) Andrew M. Doyle, Jr..

Sworn to and subscribed before me this 10th day of July, 1951. (S.) Gerald J. Gallinghouse, Notary Public.

CERTIFICATE OF MARYLAND CASUALTY CO.

Maryland Casualty Company

Be it known that the Maryland Casualty Company a Maryland Corporation with headquarters at Baltimore, Maryland, by its duly qualified officer, does hereby certify, identify and recognize the attached as a true copy of the original policy 01-493468 with endorsements issued by its duly qualified agents to Robert H. Beattie dba Oil Transport Company & Oil Transport Co. Inc., 338 Baronne Street, New Orleans, Louisiana.

Dated at Baltimore, Maryland this 28th day of June, 1951.

(S.) W. K. Lloyd, Vice-President, Maryland Casualty Company.

Attest: (S.) Glenn C. Bramble, Secretary, Maryland Casualty Company.

STATE OF MARYLAND,
City of Baltimore, ss:

This is to certify that on this 28th day of June, 1951 appeared before me W. Kenyon Lloyd and made oath in due form of law that the matters and facts contained herein are [fol. 12] true and correct to the best of his knowledge, information and belief.

Witness my notarial seal and hand this 28th day of June, 1951.

(S.) J. W. Frank, Notary Public.

N.B. The laws of this State do not require a Notarial Seal to be filed in this office.

STATE OF MARYLAND,
Baltimore City, Set.:

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, do hereby certify that J. Wm. Frank before whom the annexed acknowledgement and affidavit were made, and who has hereto subscribed his name, was, at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, residing in said City and State, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgements, or Proof of Deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily I believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 28th day of June, 1951.

(S.) M. Luther Pittman, Clerk of the Superior Court of Baltimore City. (Seal.)

NOTE RE EXHIBITS

(Photostatic copies of exhibits attached to foregoing motion to dismiss, transmitted to Court of Appeals in their original form as per order of court copied herein.)

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[fol. 13] AFFIDAVIT OF NEWTON PADGITT IN SUPPORT OF MOTION

STATE OF LOUISIANA,
Parish of Orleans:

Before me the undersigned authority, personally appeared, NEWTON PADGITT, who, being duly sworn, deposed that:

He is Marine Manager of the Southern Marine Department of defendant Home Insurance Company of New York. Attached hereto is a true copy of said defendant's sole marine protection and indemnity insurance policy No. H 407739 on the Towboat Jane Smith in effect during May, 1950.

(S.) Newton Padgitt.

Sworn to and subscribed before me this 10th day of July, 1951. (S.) Gerald J. Gallinghouse, Notary Public.

NOTE REEXHIBITS

(Copy of insurance policy attached to foregoing motion to dismiss, transmitted to Court of Appeals in its original form as per order of court copied herein.)

[fol. 14] IN UNITED STATES DISTRICT COURT

OPINION—Filed August 24, 1951

James J. Morrison, Arthur A. de la Houssaye, Browne and Rault, Raymond H. Kierr, Attorneys for Plaintiffs.

Breazeale, Sachse, Wilson and Hebert, Attorneys for Texas and Pacific Railway Company.

Deutsch, Kerrigan and Stiles, Attorneys for Maryland Casualty Company and Home Insurance Company of New York.

WRIGHT, District Judge:

Five suits now consolidated were brought against the liability underwriters of the owner and charterer of the

Towboat Jane Smith as well as against the Texas & Pacific Railway Company to recover damages for the death of seamen employed aboard the vessel. The men were drowned when the towboat capsized and sank in the Atchafalaya River. Plaintiffs' right to bring a direct action against the underwriters of the owner and charterer is predicated on Title 22 §655 of the Louisiana Revised Statutes of 1950.

The underwriters have moved to dismiss and for summary judgment, attaching to the motions copies of their policies in question. The grounds for the motion are fivefold: 1st, The Court has no jurisdiction over actions as to the underwriters because plaintiffs are proceeding under the Jones Act. Since that statute creates no direct action against tortfeasor's underwriters no such action can be [fol. 15] authorized by state statute. 2nd, Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 which authorizes a direct action against a tortfeasor's liability insurer does not apply to policies of marine insurance. 3rd, Section 655 would be unconstitutional if it purported to apply to policies of marine insurance in that it would infringe the exclusive constitutional grant to the federal government of jurisdiction over marine matters. 4th, Movers' assureds, the owner and charterer of the towboat Jane Smith, have initiated limitation of liability proceedings with respect to the accident in suit and the statutory injunction of the Limitation of Liability Act precludes the instant actions. 5th, Since plaintiffs are enjoined in the limitation proceedings from suing movers assureds they are precluded by Section 655 itself from suing.

The plaintiffs on the other hand assert that they are not proceeding primarily under the Jones Act; that federal jurisdiction in this case is based on diversity of citizenship and jurisdictional amount and plaintiffs are proceeding against movers under Section 655 on the contracts of liability insurance which they contend are for the protection of the public as well as the assureds. They contend also that the regulation of insurance companies including marine insurance is a matter specifically reserved to the states by congressional act and this action under Section 655 is in no way affected by the so-called uniformity doctrine in admiralty. They contend further that the right of action as

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[fol. 16] to the underwriters is unaffected by the limitation of liability proceeding in that that proceeding protects the owner as distinguished from the insurer and the insurer cannot set up as a defense to this action the owner's defense of limitation.

There are several reasons why this action may not stand as against the underwriters. In disposing of these motions, however, this court will cite but two.

The policies in question are marine protection and indemnity policies protecting the owner and charterer of the towboat Jane Smith against liability for personal injury and accidental death occurring on board the vessel. This type of insurance is described in the Louisiana Insurance Code in Louisiana Revised Statutes of 1950, Title 22, Section 6, Subsection 13(e). Title 22, Section 6 defines and classifies the various types of insurance covered by the code. Liability insurance is defined in Section 6, Subsection 4,[1] whereas marine and transportation (inland marine) insurance is defined in Revised Statutes Section 6, Subsection 13.[2]

[fol. 17] Louisiana Revised Statutes of 1950, Title 22, Section 655,[3] under which this action is brought, is entitled,

---

[1] (4) Liability. Insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property.

[2] 13(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

[3] Sec. 655—No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which

"Liability policy; . . . direct action against insurer" and relates solely to liability insurance as described in Title 22, Section 6, Subsection 4. The policies in suit, however, are policies of marine insurance described in Title 22, Section 6, Subsection 13(e). The legislature when it used the term [fol. 18] "liability insurance" in Section 655 obviously intended to limit the application of that section to liability insurance. If it intended Section 655 to be applicable to marine insurance it would have said so. Plaintiffs argue that the term "liability insurance" used in Section 655 is broader than the definition of liability insurance in Section 6, Subsection 4. That argument, however is unsupported by the basic principles of statutory construction. What purpose would there be in defining the types of insurance cov-

---

may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

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ered by the code if the very definitions given in the code are to be ignored by the code itself?

There is yet a more fundamental reason why the action brought against the underwriters must be abated. The charterer and owner of the Jane Smith have filed limitation of liability proceedings under Title 46, Section 183, U. S. Code. Plaintiffs have filed their claims in that action covering the very claims here in suit. If this action against the shipowner's underwriters is allowed to proceed, the shipowner may be deprived of his right to indemnification against his underwriters. If these plaintiffs should be paid any part of their claims in the limitation proceeding, then the shipowner under his contracts of insurance has a right to be reimbursed by his underwriters. If the underwriters' exposure on the policies is exhausted in paying the claims in this case, then the shipowner's right against his insurers will avail him nothing.

The effect therefore of allowing these plaintiffs to pro- [fol. 19] ceed directly against the shipowner's insurers would be to force the owner to turn his insurance into the limitation proceeding as part of "the interest of such owner in such vessel".[4] This the owner is not required to do. *City of Norwich*, 118 U. S. 468.

The very purpose of the limitation of liability statute is to encourage the investment of capital in shipping in general and in ships in particular. At the time the limitation of liability statute was first adopted by the Congress of the United States in 1851 there was an essential difference between the limitation of liability statutes of the continental countries and that of England. In the continental countries such as Holland[5] and France,[6] the value of the owner's limitation, whereas in England under the Act of 53 George III it was the value before the accident which had to be accounted for. Consequently under the continental statutes interest after the collision or accident was surrendered in limitation could be achieved simply by surrendering the vessel in the condition in which it was after the accident.

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[4] Title 46, § 183(a).

[5] Grotius, War and Peace, Book 2, Chapter 11, Sec. 13.

[6] French Ordonnance de la Marine 1681.

The shipowner could then claim his insurance and reim- [fol. 20] burse himself for any losses resulting from the collision and the limitation. The English law on the other hand in effect required the shipowner to account in the limitation proceeding for his insurance money.

Congress in passing Revised Statute 4283,[7] our first limitation of liability statute, adopted the continental view. *Norwich Company* v. *Wright*, 80 U. S. 104. Consequently the value of the interest to be surrendered in limitation under our law is the value after the collision, and the shipowner is then free to claim the insurance money as his own. *City of Norwich*, supra. It is true that in the City of Norwich the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in the City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance. The purpose of our limitation statute as distinguished from that of England was and is to provide a shipowner with a method not only of limiting his liability but also of protecting himself against loss by providing himself with insurance. Thus not only is capital encouraged to come into the merchant marine but a method is provided by which that capital may be replenished after losses resulting from the perils of the sea.

[fol. 21] From the above it is obvious that the Congress of the United States under its constitutional perogative to provide laws affecting admiralty and maritime jurisdiction has occupied the field of limitation of liability including contracts of insurance as they relate to the same. *Lindgren* v. *United States*, 281 U.S. 38. To give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Title 46 § 183 U.S.C.A.

In view of the foregoing the motions for summary judgment are granted and each of these proceedings is dismissed

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[7] Now Title 46, § 183 U. S. Code.

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as to Maryland Casualty Company and Home Insurance Company of New York.

Since there is no just reason for delay let judgment be entered herein in accordance with Rule 54(b) Federal Rules of Civil Procedure.

New Orleans, Louisiana, August 24th, 1951.

(S.) J. Skelly Wright
United States District Judge.

[fol. 22] IN UNITED STATES DISTRICT COURT

JUDGMENT AND ORDER GRANTING SAID MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING THE CONSOLIDATED SUITS AS TO APPELLEES—Filed August 24, 1951

The captioned consolidated causes came on for hearing on August 1, 1951, on motion of defendants Maryland Casualty Company and Home Insurance Company of New York to dismiss, and for summary judgment.

Present: Messrs. Browne & Rault, Gerard A. Rault, Esq., Attorneys for Mrs. Jean D. Randolph; James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Arthur A. de la Houssaye, Esq., Attorney for Lucille E. Welden; Raymond H. Kierr, Esq., Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.; Messrs. Breazeale, Sachse, Wilson & Hebert, H. Payne Breazeale, Esq., Attorneys for Texas & Pacific Railway Company; Messrs. Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch and Rene H. Himel, Jr., Esqs., Attorneys for The Home Insurance Company of New York and Maryland Casualty Company.

And said motions having been argued by counsel and the cases submitted, and the court having taken time to consider, now, for the reasons this day assigned in writing:

It is ordered, adjudged and decreed that the within actions be dismissed as to defendants Maryland Casualty Com- [fol. 23] pany and Home Insurance Company of New York, and that said defendants recover their costs.

It is expressly determined that there is no just reason for delay in the entry of the foregoing final judgment, and it is

accordingly directed that said final judgment be entered forthwith.

8/24/51 J.S.W.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 20, 1951

Please take notice that Gertrude Picard Cushing, individually, and as Administratrix of the Succession of Timothy Cushing, and on behalf of her minor son, Timothy Cushing, Jr., Lucille E. Welden, individually, as Administratrix of the Estate of William R. Welden, and on behalf of her minor children, Mary L. Welden and William R. Welden, II, Mrs. Jean D. Randolph, widow of Russell R. Randolph, individually, and as executrix of his estate, Mrs. Monette M. Lynch, individually, and as Administratrix of the Succession of Harold Lynch, Mrs. A. W. Ashley, and Mrs. Elizabeth Ashley Worthen, individually, and as Co-Administratrices of the Succession of Floyd L. Ashley, plaintiffs in the above entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment of this Court granting the motions for summary judgment by, and dismissing this proceedings [fol. 24] as to, Maryland Casualty Company and Home Insurance Company of New York, entered August 24, 1951.

(S.) James J. Morrison, 327 Hibernia Building, New Orleans, Louisiana, Attorney for Gertrude Picard Cushing, Plaintiff.

(S.) R. H. Kierr, Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al., National Bank of Commerce Bldg., New Orleans, La.

(S.) Arthur A. de la Houssaye, Attorney for Lucille E. Welden, Richards Building, New Orleans, La.

(S.) Gerard A. Rault, Browne & Rault, Attorneys for Mrs. Jean D. Randolph, American Bank Building, New Orleans, La.

To: A. Dallam O'Brien, Jr., Esq., Clerk, United States District Court, Post Office Building, New Orleans, Louisiana; Deutsch, Kerrigan & Stiles, Esqs., 1700 Hibernia Bank Bldg., New Orleans, Louisiana, Attorneys for Appellees.

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In United States District Court

Stipulation of Facts—Filed October 25, 1951

It is stipulated by and between appellants and appellees, through their respective undersigned counsel, that:

[fol. 25]

First

Charles C. Smith and Oil Transport Company, Inc., whose underwriters are the appellees herein, and who, at the time of the accident in which appellants' decedents were drowned, were the owner and bareboat charterer, respectively, of the Towboat Jane Smith, had, prior to institution of the captioned consolidated suits, each filed, in the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division, a proceeding for exoneration from, or limitation of, liability with respect to said accident. Said proceedings, entitled In re Charles C. Smith and In re Oil Transport Company, Inc., respectively, and numbered 512 and 508 respectively in admiralty, had been consolidated prior to institution of the captioned consolidated suits, and are presently pending. Prior to institution of the captioned consolidated suits, injunctions in the usual form had issued in both of said limitation proceedings, prohibiting the institution of suits against the petitioners in said proceedings, based on claims arising out of the aforesaid accident. Said injunctions are still in force.

Second

Prior to institution of any of the captioned consolidated suits, each appellant in said suits had filed, in both of the limitation proceedings described in the First article hereof, defensive pleadings and claims for damages resulting from the deaths of their decedents in the accident with respect [fol. 26] to which both said limitation proceedings and the captioned consolidated suits were brought.

Third

The captioned suits, all of which are on appeal to the United States Court of Appeals for the Fifth Circuit, were consolidated for trial in the district court. All of the plead-

ings, motions and exhibits in each case are substantially the same as the pleadings, motions and exhibits filed in each of the other cases, except as to names of parties and decedents, and the amounts for which suit was brought. In order to shorten the record on appeal, it is stipulated that only the complete pleadings in Civil Action No. 886 (Mrs. Jean D. Randolph, etc. vs. Texas & Pacific Railway Company, et al.) and the complaint in Civil Action No. 883 (Gertrude Picard Cushing, etc. vs. Texas & Pacific Railway Company, et al.) shall be included in the record on appeal in the captioned consolidated suits, in lieu of the entire record in each case, such pleadings to stand as the prototype of all pleadings in all of said cases; and the decision of the Court of Appeals shall determine and govern each of said consolidated cases.

Fourth

The record on appeal in the captioned consolidated suits shall include only:

1—The record in Civil Action No. 886 (Mrs. Jean D. Randolph, etc. vs. Texas & Pacific Railway Company, [fol. 27] et al.) as follows:

A—Complaint;

B—Motion to consolidate filed by appellees;

C—Order consolidating cases, entered on June 29, 1951;

D—Motions to dismiss and for summary judgment (together with annexed affidavits and exhibits) filed by appellees;

E—Opinion, judgment and order granting said motions for summary judgment and dismissing the captioned consolidated suits as to appellees, rendered on August 24, 1951, and entered on August 27, 1951.

F—Notice of appeal.

2—The complaint in Civil Action No. 883 (Gertrude Picard Cushing, etc. vs. Texas & Pacific Railway Company, et al.).

3—This stipulation.

(S.) James J. Morrison, Attorney for Gertrude Pichard Cushing, Appellant.

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(S.) Raymond H. Kierr, Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al., Appellants.
(S.) Arthur A. de la Houssaye, Attorney for Lucille E. Welden, Appellant.
(S.) Gerard A. Rault, Attorney for Mrs. Jean D. Randolph, Appellant.
[fol. 28] (S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Home Insurance Company of New York and Maryland Casualty Company, Appellees.

New Orleans,
October 18, 1951.

IN UNITED STATES DISTRICT COURT

COMPLAINT IN CASE NO. 883 CIVIL ACTION—Filed May 18, 1951

To the honorable the judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division:

The Complaint of the Succession of Timothy Cushing, Timothy Cushing, Jr., and Gertrude Picard Cushing, individually, as Administratrix of the Succession of Timothy Cushing, and on behalf of her minor son Timothy Cushing, Jr., of the full age of majority and a resident of the State of Louisiana, with respect represents that:

I

Complainant and her son, minor child of her marriage with Timothy Cushing, deceased, are both residents of Louisiana and the Succession of Timothy Cushing, her husband, has been opened at the court of his domicile, the 24th Judicial District Court, Parish of Jefferson, Louisiana, under Docket No. 34,217, wherein she was appointed administratrix; while each of the defendants is a foreign corporation organized under the laws of a State other than Louisiana, authorized to do and doing business in the Eastern Dis-[fol. 29] trict of the State of Louisiana. The amount in controversy exceeds $3,000.00, exclusive of interest and

costs. Furthermore, so far as defendants Maryland Casualty Co. and Home Insurance Co. of New York are concerned, plaintiff claims the benefit of the provisions of the Jones Act, 41 Stat. 1007, as amended.

II

Oil Transport Company, Inc., charterer of, and Charles C. Smith, owner of, the Towboat Jane Smith, named in this complaint, are not made parties to this action because plaintiff is enjoined from proceeding against them except in Limitation of Liability Proceedings filed under Docket Numbers 508 and 512 of this Honorable Court, wherein the said owners and operators of the said vessel seeks exoneration from all liability, or in the alternative to limit their liability under the Admiralty Law to the value of the wrecked and sunken Towboat Jane Smith at the bottom of the Atchafalaya River, which they allege has no value.

III

Defendants Maryland Casualty Company and Home Insurance Co. of New York are the liability insurance underwriters of the Towboat Jane Smith, of Charles C. Smith, and of Oil Transport Inc., under policies of liability insurance issued and/or delivered in the State of Louisiana, with respect to the injuries, damage and loss which are the subject of this complaint, and as such are liable to this [fol. 30] direct action under La. R. S. 22: 655.

IV

During all material times Charles C. Smith was the owner, and Oil Transport Company, Inc., was the charterer and operator, of the Towboat Jane Smith, and used it in the transportation of freight for hire by water in interstate commerce.

V

During May of 1950, Timothy Cushing, age 41 years, a First Engineer, was employed by Oil Transport Company, Inc., as deckhand on the Towboat Jane Smith on a voyage towing two empty barges from Follansbee, West Virginia, to Drestrehan, Louisiana. Enroute the voyage was changed

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to Lake Charles, La., via the Atchafalaya River. The wage stipulated for was $87.50 every two weeks, plus found, which is equal to $200.00 every two weeks as a shore worker.

VI

At about 9:00 P.M., May 19, 1950, the Towboat Jane Smith and tow, being navigated by her Master, arrived at the Texas and Pacific Railroad Bridge over the Atchafalaya River at Melville, La., which bridge is owned and operated by defendant Railroad, and signaled for the draw to open. At this time Timothy Cushing was off duty and on information and belief asleep in his cabin.

VII

Plaintiff avers on information and belief that in attempt- [fol. 31] ing to pass through the span of said bridge the bridgetender delayed opening the drawspan of said bridge, forcing the Jane Smith to make several unsuccessful attempts at the draw before it was opened and the Jane Smith and her tow finally were forced against the concrete pier of the drawspan and into the superstructure of the fixed span of the bridge, wherefore the Jane Smith was capsized and Timothy Cushing trapped in his berth and drowned.

VIII

Plaintiff avers that nothing Timothy Cushing did, or omitted to do, caused or contributed to said accident, but, on information and belief, that said accident was caused or contributed to solely by the negligence of defendant Railroad, or in the alternative by the negligence of defendant insurance companies' assureds, or in the further alternative, by their joint negligence, in the following particulars, among others, that will be shown at the trial hereof:

1. The Railroad's bridge tender was negligent and inattentive to duty.

2. The Railroad's bridge tender failed, neglected and refused to raise the draw on proper signal and approach of the vessel.

3. The Railroad's bridge tender unreasonably and negligently obstructed the fairway of the river by re-

fusing and neglecting to raise the draw on proper signal and approach of the vessel.

4. The Railroad's bridge tender unreasonably delayed the tow's passage through the span for so long a time that said tow got out of alignment, and when [fol. 32] the bridge finally opened the tug and tow were unable to negotiate the span.

5. The bridge was improperly and unsafely constructed and failed to provide fenders or other protective works.

6. The Jane Smith was unseaworthy.

7. The tug and tow were unseaworthy.

8. The tug and tow were in charge of an incompetent and inexperienced master.

9. The tug and tow did not have an experienced pilot aboard.

10. Those in charge of the Jane Smith failed to keep a proper lookout.

11. Those in charge of the Jane Smith were negligent and inattentive to duty, particularly in attempting to pass through the draw without being properly aligned.

12. No warning or alarm was sounded to give Timothy Cushing a chance to escape, as he would have had an alarm been sounded when the danger of collision first became apparent.

13. That the decedent's death was caused by the negligent manner in which the Towboat "Jane Smith" was maintained, operated, and controlled, and by its unseaworthiness, all of which, and the following, were with the knowledge and privity of its owners, operators, and Master, and further resulted by the negligent failure of said parties and their employees to perform their following duties: to provide decedent with a seaworthy vessel and barges and to keep the same in safe condition; to furnish him with ample, proper, and reasonably safe and seaworthy tools, tackle, appliances, gear, equipment, safeguards and working conditions, and to keep the same in a proper state of repair and in safe condition; to furnish decedent with a sufficient number of competent co-employees, superior officers, pilots and crew: to provide for

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the safe and proper navigation and operation of said vessel and tow; to promulgate and enforce proper rules for the safe conduct of the operation, of, and work on, said towboat and tow, including decedent's duties [fol. 33] thereon, and to warn decedent and others of the dangers arising and to be encountered therein, and to protect decedent from said dangers; including but not limited to the following specific acts of negligence.

(a) A competent pilot of the Atchafalaya River was not aboard, and the vessel was insufficiently manned for proper navigation and operation;

(b) The vessel was top-heavy and unstable;

(c) The vessel lacked adequate freeboard and was not properly equipped with water-tight doors and bulkheads;

(d) Machinery was exposed to flooding and lacked emergency safeguards;

(e) Proper notices were not issued or posted, directing that water-tight bulkhead doors and other doors and parts be closed;

(f) Vessel was unseaworthy due to faulty trim, load, and design;

(g) The towing cables, lines, ratchets, and equipment were defective and unsafe, and the tow was improperly made up;

(h) The stearing apparatus and rudders of the vessel were defective and unsafe and the said towboat did not respond properly thereto;

(i) The engine of the vessel was inadequate and unseaworthy so that the said towboat was unable to properly control her tow;

(j) One of the vessel's search-lights were broken and rendered unsafe the night operation required by the owners and operators;

(k) No alert, alarm, or warning signal was given, and the devices therefor, and the lifesaving equipment were defective and inadequate;

[fol. 34] (l) The vessel's machinery, tackle, equipment, and gear were deteriorated, inadequate, unseaworthy, and in a state of disrepair; and

(m) The Master of wheelsman was required to perform manifold duties beyond the capacity of one person, which, together with the foregoing, caused or contributed to the lack of sufficient headway of the tow through the water and lack of ample maneuvering distance at the time of and prior to the casualty.

IX

Plaintiff avers that both defendant railroad and the owners and operators of the tug Jane Smith and tow, and the Master and Officers thereof, of whom the other defendants are insurers, fully knew or should have known of the exceptionally dangerous, treacherous and hazardous nature of the passage through the draw at the Melville Railroad Bridge over the Atchafalaya River, and of the extremely strong, swift and irregular currents and cross-currents expected, to be met at and near said bridge, and of the difficulties of negotiating said draw and the dangerous nature thereof; that in view thereof it was the particular duty of the bridge tender of said bridge promptly either to raise said span on the approach of a vessel, or to signal a delay; that in the instant case said bridgetender did neither, but, by neglecting to open the span and giving no signal forced and required said Jane Smith to negotiate and renegotiate such dangerous waters—to approach, back away, reapproach, back away again, and again reapproach said span all the while maneuvering against said treacherous [fol. 35] currents, eddies and cross-currents and confusing and confounding the Master and Officers of said vessel and keeping them in extremis and at tension as to whether the bridge would, or would not open, and whether the vessel should come ahead or reverse, and whether she was properly aligned for the passage or not; and similarly, it was the duty of the Master and Officers of the Jane Smith to exercise particular care and caution in manoeuvering through said span; that under all of the circumstances above set forth, the death of Timothy Cushing, aforesaid, was caused by the joint fault and negligence of the defendants railroad's bridgetender in failing and neglecting promptly to open said span when he could have done so on the approach of said vessel, and thus placing the Master thereof

in extremis and indecision in manoeuvering her; and the joint fault and negligence of the Master and Officers of the Jane Smith in failing properly and carefully align and manoeuvers the vessel and tow through said draw.

X

Plaintiffs aver that the body of Timothy Cushing has never been recovered, that they, and he, have been denied the solace of a decent burial for him; that plaintiff Timothy Cushing, Jr. is an infant of tender years and has thus been deprived of the loving care, comfort, support and training of his father; that plaintiff Gertrude Picard Cushing, individually, has been deprived of the love, affection, comfort [fol. 36] and support of her husband, the father of her child, and the only source of the support and maintenance of herself and family; that by reason of the matters and things aforesaid plaintiffs have suffered damages as follows:

Damages due Timothy Cushing and His Succession for personal injuries and death	$150,000.00
Damages to deponent by reason of the death of Timothy Cushing	150,000.00
Damages to Timothy Cushing, Jr., by reason of the death of Timothy Cushing	150,000.00
Total	$450,000.00

XI

Plaintiffs demand a jury trial.

Wherefore, plaintiffs demand a jury trial, and judgment against defendants jointly, severally and in solido in the sum of $450,000.00, plus interest and costs.

(S.) James J. Morrison, Attorney for Plaintiff, #327 Hibernia Bank Building, New Orleans, Louisiana.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TRANSMITTING EXHIBITS IN THEIR ORIGINAL—Filed: November 7, 1951

On motion of James J. Morrison and on suggesting to the Court that the originals of the exhibits filed in this matter should be included as a part of the record on appeal in lieu of copies thereof.

[fol. 37] It is ordered that the originals of the Exhibits filed in this matter should be included as a part of the record on appeal in lieu of copies thereof.

November 7th, 1951

(S.) J. Skelly Wright,
Judge.

(S.) James J. Morrison, Attorney for Appellants, 1014 Pere Marquette Bldg., New Orleans, La.

[fol. 38] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERTRUDE PICARD CUSHING, ETC., ET AL.,

versus

MARYLAND CASUALTY COMPANY, ET AL.,

No. 13887

ARGUMENT AND SUBMISSION—April 23, 1952

On this day this cause was called, and after argument by James J. Morrison, Esq., for appellants, and Eberhardt P. Deutsch, Esq., for appellees, was submitted to the Court.

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[fol. 40] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13887

GERTRUDE PICARD CUSHING, ETC., ET AL., Appellants,

versus

MARYLAND CASUALTY COMPANY, ET AL., Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION OF THE COURT—Filed July 31, 1952

Before HOLMES, STRUM, and RIVES, Circuit Judges.

STRUM, Circuit Judge: This appeal is from a summary judgment dismissing, as to the insurers involved, five consolidated actions at law brought to recover damages for the death of five seamen who drowned when the tug boat "Jane Smith" collided with a bridge, capsized and sank in navigable waters within the admiralty jurisdiction in Louisiana. Federal jurisdiction is asserted both under [fol. 41] Sec. 33 of the Merchant Marine (Jones) Act of 1920, 46 U. S. C. A. 688, and upon diversity of citizenship.

The suits are against Texas & Pacific Railway Company, owner of the bridge, and Maryland Casualty Company and Home Insurance Company, who are the liability insurance underwriters of the owner and charterer of the tug, insuring against loss of life by, or personal injury to, the crew of said vessel. The complaints allege that the deaths were due to the negligence of the bridge owner, and of the owner and charterer of the tug.

Plaintiffs assert the right to directly sue the insurers under Louisiana's "direct action" statute, Title 22, Sec. 655, La. Rev. Stat. 1950, which provides in part: "The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy, * * * and said action may be brought against the insurer alone or against both the insured and the insurer, jointly * * *." The policies involved were issued and delivered in Louisiana.

The dominant question is whether or not the statute applies to policies which protect the owner and charterer of a vessel against liability for personal injuries or accidental death suffered by the crew of a vessel in navigable waters. The district judge answered the question negatively. He was of the view that Sec. 655, *supra*, which relates to "liability" insurance, is confined to the ordinary type of liability insurance as defined in Title 22, Sec. 6(4), La. Rev. Stat. 1950, and does not extend to "marine protection and in- [fol. 42] demnity insurance," as defined in Sec. 13(e) of that title, which is the type of policy here sued upon. He was further of the view that to give effect to the direct action statute as to these policies would be an invasion of the field of exclusive federal jurisdiction over admiralty and maritime matters which would not only impair the characteristic features of general maritime law, but would contravene the essental purpose of limitation of liability procedings in admiralty, under 46 U. S. C. A. 183, which have been instituted by this owner and charterer, and in which these plaintiffs have filed claims. As one of the policies also provides hull insurance, the district judge was further of the view that to the extent of plaintiffs' recovery in the limitation proceedings, the owner would be compelled to surrender insurance money to the claimants therein, contrary to the rule established in *Norwich v. Wright*, 80 U. S. (13 Wall.) 104, 20 L. Ed. 585, and in *City of Norwich*, 118 U. S. 468, 30 L. Ed. 134, that an owner's liability is confined to the value of the vessel after the damage, not before, and that insurance money belongs to the owner, not to the claimants.[1]

Note (1): The district judge said: "If these plaintiffs should be paid any part of their claims in the limitation proceedings, then the shipowner under his contracts of insurance has a right to be reimbursed by his underwriters. If the underwriters' exposure on the policies is exhausted in paying the claims in this case, then the shipowner's right against his insurers will avail him nothing.

"The effect therefore of allowing these plaintiffs to proceed directly against the shipowner's insurers would be

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It appears to us that in enacting Sec. 655, *supra*, the Louisiana legislature used the term "liability insurance," in its broad generic sense, meaning that form of insurance by which an insured is indemnified against liability on account of bodily injuries sustained by others. The statute [fol. 43] is not limited to the one type of liability insurance defined in Sec. 6(4), Title 22, *supra*, but extends as well to marine liability insurance of the type here involved. The statute is remedial.[2] It should be liberally construed to accomplish its obvious purpose, which is to afford an injured person a direct action against a compensated insurer who has assumed ultimate liability. There is no indication in Sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others. On the contrary, it appears to us that it was intended, so far as the state legislative powers are effective, to extend the right to all persons covered by what is broadly known as "liability insurance," including policies of the type here in question. While the policies sued on cover marine activities, fundamentally they are ordinary contracts of indemnity insurance.

Title 28 U. S. C. A. 1333, a part of the original Judiciary Act of 1789, provides that United States district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled." Applying this clause in upholding the validity of the New York Arbitration statute as applied to a dispute under a charter party made and to be performed in that state, the United States Supreme Court said: "The 'right of a common law remedy,' so saved to suitors, does not * * * include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceed-

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to force the owner to turn his insurance into the limitation proceeding as part of 'the interest of such owner in such vessel.' This the owner is not required to do. City of Norwich, 118 U. S. 468, 30 L. Ed. 134."

Note (2): Gager v. Teche Transf. Co., 143 So. 62; Hudson v. Georgia Cas. Co., 57 Fed. (2) 757.

[fol. 44] ings in admiralty which may be employed to enforce the right or to redress the injury involved. * * * A State may not provide a remedy *in rem* for any cause of action, within the admiralty jurisdiction. * * But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. * * * In no case has this Court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty." *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123, 68 L. Ed. 582, 586. These principles are determinative here.[3]

While Sec. 655, *supra*, confers upon an injured party a substantive right which becomes vested at the moment of the injury,[4] it is not a right essentially maritime in character, nor one peculiar to admiralty or maritime jurisdiction, but is one which applies alike to all contracts of public liability insurance, regardless of whether the in-

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Note (3): See also Western Fuel Co. v. Garcia, 257 U. S. 233, 66 L. Ed. 210, and Great Lakes D&D Co. v. Kierejewski, 261 U. S. 479, 67 L. Ed. 756, holding that although admiralty affords no relief for wrongful death under general maritime law, an action *in personam* may be maintained in admiralty under a state "wrongful death" statute to recover for a death upon navigable waters as a result of a maritime tort. (Statutory remedies for personal injuries or death suffered by a seaman, or for wrongful death on the high seas, are now provided by 46 U. S. C. A. 688, 761). Also, see Jarka Corp. v. Hellenic Lines (CA-2) 182 Fed. (2) 916, 919, holding general New York law applicable to a stevedoring contract, which is a maritime contract. What was said as to "uniformity" in So. Pac. Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, has been sharply limited by Standard Dredging Corp. v. Murphy, 319 U. S. 306, 87 L. d. 1416.

Note (4): Fisher v. Home Indemnity Co. (CA-5), decided June 30, 1952, ... Fed. (2) . . . . ; New Amsterdam Cas. Co. v. Soileau (CA-5) 167 Fed. (2) 767; Belanger v. Great American Indemn. Co. (DC-La.), 89 Fed. Supp. 736; West v. Monroe Bakery, Inc. (La.) 46 So. (2) 122.

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jury occurs ashore or afloat. There is nothing in it which undertakes to change the substantive admiralty law, nor does it undertake to deal with a remedy in courts of ad- [fol. 45] miralty. The statute provides only an additional and cumulative remedy at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer. Thus the statute does not conflict with any feature of substantive admiralty law, nor with any remedy peculiar to admiralty jurisdiction. These suits are at law, not in admiralty.

Appellees, the insurers, further contend that the Jones Act, 46 U. S. C. A. 688, creates a right of action against an injured seaman's employer, but not against the employer's liability underwriter, and that the State of Louisiana can not add to the rights created by the Jones Act. It is unnecessary, however, to determine that question. Even if there were no jurisdiction, nor any right of action, under the Jones Act, which we do not decide, diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3,000.00 is involved in each suit. These circumstances support federal jurisdiction. The complaints contain averments which sufficiently assert liability upon general principles of negligence, and also for accidental death within the coverage of the policies sued upon, so that a cause of action is stated.

Appellees' contentions over-inflate a relatively simple proposition with apparent, but unreal, technical problems. Stripped of illusory technicalities, the Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative remedy *at law* against an insurer who has agreed to indemnify the *tort feasor* against liability, by subrogating the injured person [fol. 46] to all the rights of the insured within the terms and limits of the policy. Other existing remedies are not in the least impaired or affected. *New Amsterdam Cas. Co. v. Soileau* (CA-5) 167 Fed. (2) 767. Such contracts of insurance are for the benefit of the public, as well as of the insured employer. *Davies v. Consolidated Underwriters*, 6 So. (2) 351; *West v. Monroe Bakery, Inc.*, 46 So. (2) 122. The statute is simply a regulation by the state of insurance companies doing business within its boundaries, for

which there is ample sanction in federal law. 15 U. S. C. A., 1011, 1012, the McCarran Act.[5] The limitation of liability statutes, 46 U. S. C. A. 183, *et seq.*, relate, not "to the business of insurance" as mentioned in the McCarran Act, but to the liability of shipowners. The object of that proceeding is to limit the liability of the owner, not to preclude injured persons from pursuing any remedy open to them against others. To permit such an action will not defeat the purpose of the federal limitation of liability statute, nor will it interfere with the harmony or uniformity of admiralty law in its international or interstate relations. That the remedy may not exist in states other than Louisiana is not a tenable objection. The same was true in *Red Cross Line v. Atlantic Fruit Co., supra*, involving the New York Arbitration statute.

The Louisiana statute is wholly a regulation of the liability of insurers doing business in Louisiana upon [fol. 47] obligations voluntarily assumed by them there. We see no reason why it should not be applied to liability policies such as those here sued upon, even though the injuries were suffered upon navigable waters. Federal jurisdiction exists, and the complaints state a cause of action.

Reversed and Remanded.

Note (5): "Congress declares that the continued regulation * * * by the several states of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation * * * of such business by the several states." 15 U. S. C. A. 1011.

"No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance * * * unless such act specifically relates to the business of insurance." 15 U. S. C. A. 1012(b).

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[fol. 48] No. 13887

GERTRUDE PICARD CUSHING, ETC., ET AL.,

versus

MARYLAND CASUALTY COMPANY, ET AL.

JUDGMENT—July 31, 1952

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Maryland Casualty Company and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 49] UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 13,887

[Title omitted]

PETITION FOR REHEARING—Filed August 18, 1952

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Maryland Casualty Company and Home Insurance Company of New York, appellees, for a rehearing before the court *en banc*, with respect represents that the court erred:

[fol. 50] First

In holding, contrary in principle to decisions of this court, sitting in panels including other of its judges, that

state direct-action statutes may impair the obligations of maritime contracts.

Second

In disregarding the Congressional mandate that an action for death of a seaman resulting from his employer's fault, lies exclusively under the Jones Act.

Third

In holding that application of state direct-action statutes to maritime policies does not operate to circumvent and nullify both the letter and the spirit of national legislation for the limitation of shipowners' liability.

Fourth

In failing to hold that pendency of a limitation-of-liability proceeding instituted in admiralty by an insured shipowner, itself precludes a direct action at law under a state statute against the shipowner's insurer.

Fifth

In holding that the McCarran Act sanctions such application of state direct-action statutes to marine insurance as to effect nullification of national legislation for limitation of shipowners' liability.

[fol. 51]

Sixth

In holding, contrary to the express provision of section 611 of the Louisiana Insurance Code, that the Louisiana direct-action statute is legislatively intended to apply to the marine policies at bar.

WHEREFORE petitioners pray that a rehearing be granted herein before the court *en banc*, that the order of this court rendered on the original hearing be recalled, and that the judgment of the district court be affirmed.

Deutsch, Kerrigan & Stiles, Attorneys for Petitioners-Appellees.

Eberhard P. Deutsch,
Rene H. Himel, Jr.,
Advocates.

I certify that the foregoing petition is filed in good faith and not for delay, and that copies thereof have been served on counsel for appellants.

[fol. 52] UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Title omitted]

BRIEF IN SUPPORT OF PETITION FOR REHEARING

May It Please the Court:

First

State Statutes May Not Impair Obligations of Maritime Contracts

It is submitted that the opinion of the court herein is contrary to holdings of judges of the court sitting in different panels.

Extension of state direct-action statutes to marine policies, themselves expressly prohibiting direct actions, patently permits state impairment of maritime contracts—a [fol. 53] result precluded by this court itself when composed of Judges Foster, Bryan and Dawkins.[1]

State direct-action statutes can no more alter the terms of marine insurance contracts than, as pointed out by Judge Hutcheson, sitting with Judges Russell and Strum, only a month prior to rendition of the instant opinion, they "may constitutionally impair the obligation of a contract to the extent of invalidating a valid 'no action' provision of a policy issued and accepted in another state."[2]

Judge Borah of this court, while a district judge, held expressly that such an action could not be sustained under the Louisiana direct-action statute.[3]

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[1] The Minnie R, 1931 AMC 995 (CA 5), cert. den., 284 US 628.

[2] Fisher vs Home Indemnity Company, CA 5—June 30, 1952.

[3] Sanford vs Zurich General Accident & Liability Ins. Co., CA 655, ED La.

The court seeks to justify application of state direct-action statutes to maritime causes of action by reference to *Red Cross Line vs Atlantic Fruit Co.*,[4] which upheld application to a maritime contract, of a state law validating contractual arbitration provisions.

The grounds for the holding were (1) that the parties to the contract had voluntarily included therein an arbitration clause substantively valid under maritime law,[5] and (2) that the state statute concerned accordingly did "not attempt . . . to modify the substantive maritime law", but merely provided a common-law remedy for enforcement of an existing substantive maritime right.

[fol. 54] Since this court, in its instant opinion, recognizes the creation, by state direct action statutes, of a substantive right unrecognized by admiralty law, the *Red Cross* case is neither direct nor analogous precedent for this court's holding.[6]

Second

Jones Act Gives Exclusive Right of Action for Death of Seaman by Employer's Fault

This court observes that "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

The court must simply have overlooked the fact that appellees were sued for the fault of the deceased seamen's employer, actions based on which may not be brought except under the Jones Act.[7]

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[4] 264 US 109 (1924).

[5] The instant marine policies, precisely to the contrary, expressly prohibit direct actions, unknown to the maritime law.

[6] City of Norwich, 118 US 468 (1886); Donald T. Wright, 1940 AMC 291 (WD Ky.).

[7] Cosmopolitan Shipping Co. vs. McAllister, 337 US 783 (1949); Lindgren vs. United States, 281 US 38 (1930); Northern Coal Co. vs. Strand, 278 US 142 (1928).

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Third

Application of State Direct-Action Statutes to Marine Policies Nullifies National Legislation for Limitation of Shipowner's Liability.

The Supreme Court has declared emphatically that to "compel the shipowner to surrender his insurance in order [fol. 55] to have the benefit of limited liability . . . would defeat the principal object of the law" which was to encourage the merchant marine.[8]

Although the cited case involved hull insurance, and direct actions had not yet then come into being, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage in marine insurance is to indemnify the insured shipowner for his own losses—not to provide a fund for claimants in his limitation proceeding.

It is submitted that the lucid and forceful discussion of this principle by the district judge is an incontrovertible exposition thereof. This court's misconstruction of his opinion is evidenced by its obvious error of fact in its suggestion that the analogy which he drew to the case of the *City of Norwich* was induced by the fact that "one of the policies also provides hull insurance".

No hull insurance policy or coverage whatever is involved in this litigation, as the district judge expressly recognized in holding that "it is clear from the reasoning in the *City of Norwich* that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance".[9]

To allow such P&I protection to be drained away by direct actions under state law, deprives the shipowner of the complete benefit of limitation of liability to the same extent as [fol. 56] if he were forced to surrender the full amount of his insurance coverage, as well as his vessel, into the limitation fund.

Such a result is affirmatively precluded by the federal

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[8] City of Norwich, 118 US 468, 504 (1886).

[9] Cushing vs. Texas & Pacific Railway, et al., 1951 AMC 1878, 1882 (ED La.).

Limitation of Liability Act, as construed by the Supreme Court. As between the Congressional enactments for limitation of shipowners' liability, and a state direct-action statute—assuming both to be remedial and deserving of liberal application—certainly the federal legislation must prevail.

Fourth

Pendency of Proceeding in Admiralty for Limitation of Shipowners' Liability Precludes Direct Action under State Statute against Shipowners' Insurer

The Supreme Court has held directly that during pendency of a limitation proceeding, claims for loss or damage within the purview of that proceeding may not be asserted elsewhere. By this "statutory injunction", no other court may exercise jurisdiction over such claims.[10]

Even under the state direct-action statute, the present appellants have no claims, contractual or in tort, directly against the underwriters, but are merely permitted to assert against the underwriters their claims against the petitioning shipowner and charterer.[11]

[fol. 57] As shown, however, jurisdiction over such claims elsewhere than in the limitation proceeding, is expressly precluded by the statutory injunction of the federal Limitation of Liability Act.

This court has itself held that the federal legislation for the limitation of shipowners' liability is "practically written into", and precludes direct recourse against, the undertakings of shipowners' sureties,[12] whose position is closely analogous to that of marine P&I underwriters.[13]

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[10] The San Pedro, 223 US 365 (1911); Providence & N. Y. SS Co., vs. Hill Mfg. Co., 109 US 578 (1883).

[11] Ruiz vs. Clancy, 182 La. 935 (1935); Graham vs. American Employers Ins. Co., 171 So. 471 (La. App.-1937).

[12] Société Napthes Transports vs. Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652. To the same effect: Monongahela River Consol. Coal & Coke Co. vs. Hurst, 200 Fed. 711 (CA 6-1912), cert. den., 226 US 608, 612.

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Further, even if marine underwriters were amenable to direct action under state statutes, they would themselves be entitled to the benefit of the Limited Liability Act. The Supreme Court has squarely so held with respect to shareholders of a shipowning corporation, who were subject, under state law, to direct actions for the corporation's debts.[14]

Fifth

McCarran Act does not Sanction State Regulation of Marine Insurance

This court's principal reliance, in disposing of appellees' position respecting the effect of federal legislation for limitation of shipowners' liability, was on the McCarran [fol. 58] Act. The court has now simply held in effect, that under the provisions of that Act, state direct-action statutes may displace the national Limitation of Liability Act.

As pointed out by the Supreme Court, Congress intended no more, in passing the McCarran Act, than removal from the field of state insurance legislation, of the ban of the commerce clause.

The McCarran Act was never intended to validate state laws contravening other provisions of the federal constitution, or violative of federal statutes dealing with subjects other than interstate commerce.[15]

This court itself, speaking through Judge Hutcheson, sitting with Judges Russell and Strum, only a month before

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[13] The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. Edwards vs. Royal Indemnity Co., 182 La. 171 (1935).

[14] Flink vs. Paladini, 279 US 59 (1929).

[15] Prudential Ins. Co. vs. Benjamin, 328 US 408 (1946): "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." House Report No. 143 on the bill which became the McCarran Act.

rendering its instant opinion, held that state direct-action statutes may not "constitutionally impair the obligation of a contract (of insurance) to the extent of invalidating a valid 'no action' provision of a policy issued and accepted in another state".[16]

The McCarran Act must equally be held to be constitutionally powerless to allow state supersession of federal maritime legislation. The federal constitution lodges in the national government exclusive power to legislate in matters maritime. Even Congress cannot authorize the [fol. 59] states to legislate in that field, especially in impairment of express federal law.[17]

Sixth

Louisiana Direct-Action Statute Not Legislatively Intended to Apply to Marine Policies

Section 611 of the Louisiana Insurance Code, expressly providing that the Part of the Code containing the direct-action statute is to have no application to marine insurance, was not specifically called to the attention of this court on the original hearing because it seemed clear from the Code as a whole that the Legislature of Louisiana did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government.

For this reason, the court apparently overlooked section 611 which is at the head of Part XIV of the Louisiana Insurance Code, and stated that "there is no indication in Sec. 655 (in the same Part of the Code) that the Louisiana Legislature intended to deny the right of direct action to persons covered by marine policies".

Section 611 declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine . . ." This court need hardly be reminded that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not

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[16] Fisher vs. Home Indemnity Co., CA 5—June 30, 1952.

[17] Constitution, Article III, sec. 2; Article VI; The Thomas Barlum, 293 US 21 (1934); Knickerbocker Ice Co. vs. Stewart, 253 US 149 (1920).

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[fol. 60] Inland Marine insurance at all, but *Ocean Marine* business".[18]

It is submitted that this declaration places beyond dispute the clear intention of the Legislature of Louisiana to recognize the constitutional limitations on its own powers with respect to marine policies, by providing in unmistakable terms that the direct-action statute is to have no application to them.

Conclusion

P&I coverage, under policies expressly prohibiting direct actions against the underwriters, is carried by shipowners in reliance on the Supreme Court's holding that they, and not their creditors, will have the benefit of such insurance in the event of proceedings for limitation of liability.

P&I policies are issued in contemplation of the rules of law (1) that, as maritime contracts, they are governed by maritime, and not by state, law; (2) that under maritime law, the contractual provision in such policies prohibiting direct actions will be enforced; and (3) that liability under such policies will be limited by operation of federal legislation for limitation of shipowners' liability.

[fol. 61] This court's opinion, if permitted to stand, will tolerate direct subversion, by state statute, of federal policy expressed through national legislation.

Judge Borah of this court, while a judge of the Eastern District of Louisiana, and both present judges of the latter

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[18] National Underwriter Service, FC&S Bulletins, Inland Marine, A-a-1, April, 1939. The term "ocean marine", like "wet marine", is simply used to distinguish true marine insurance from so-called "inland marine" or land transportation insurance, which does not cover marine or waterborne risks, but only fire, theft and related lines. 4 Appleman, Insurance, sec. 2104, pp. 4-5. Winter, in his leading work on "Marine Insurance", states that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance". P. 117.

court, have all held that the Louisiana direct-action statute may not support such an action.[19]

This court has itself heretofore ruled directly, by other panels of judges, that state law can neither control the terms of marine policies nor even impair the obligations of land policies not issued in contemplation of such law.[20]

Because of this conflict in decisions by judges of this court, and because the opinion herein effects a complete upheaval of the established legal foundations of the marine insurance business everywhere, it is respectfully submitted that the foregoing petition for rehearing should be referred for consideration to this court *en banc*.

Deutsch, Kerrigan & Stiles, Attorneys for Petitioners-Appellees.

(S.) Eberhard P. Deutsch, Rene H. Himel, Jr., Advocates.

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[19] Sanford vs. Zurich General Accident & Liability Ins. Co., Civil Action No. 655, Borah, DJ; Loveless vs. Jahncke Service, Inc., Civil Action No. 3121, Christenberry, DJ; and the instant action below, Wright, DJ.

[20] See footnotes 1 and 2, supra.

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[fol. 62] Opinion on Petition for Rehearing—Filed October 9, 1952

In the United States Court of Appeals for the Fifth Circuit

No. 13887

Gertrude Picard Cushing, Etc., et al., Appellants,

versus

Maryland Casualty Company, et al., Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before Holmes, Strum and Rives, Circuit Judges.

By the Court: It is considered and ordered that the petition for rehearing herein filed, be and the same is hereby denied.

Rives, Circuit Judge, I dissent.

Rives, Circuit Judge, Dissenting:

A reconsideration of this case compels me to agree with the opinion of the learned district judge (*Cushing vs. Texas & Pacific Railway, et al.*, 1951 A. M. C. 1878, Eastern District of Louisiana) that in the enactment of the Louisiana [fol. 63] direct-action statute (La. Rev. Stats. 1950, Tit. 22, Sec. 655) the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government.

However that may be, the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability. It is possible that a state law might subject to the claims of the injured persons any excess of the marine liability insurance over the amount required to indemnify the shipowner. There would be substantial justice in saying that in cases of virtual destruction of the vessel and freight the insurance company should not be allowed to escape paying for the damages to the injured persons, and a statute so directing

might not conflict with any feature of substantive admiralty law. However, it is not contended that the Louisiana direct-action statute is subject to that construction. In the recent case of *West et ux, vs. Monroe Bakery, Inc., et al.,* 217 La. 189, 46 So. 2d 122, 130, the Supreme Court of Louisiana quoted from an earlier case where that Court had set out the general objects, purposes and effect of the direct-action statute and italicized the following: *"The statute expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public."*

In *Aetna Ins. Co. vs. Houston Oil and Transport Co.,* 49 F. 2d. 121, 124, Circuit Judge Foster speaking for this Court [fol. 64] said, "Policies of marine insurance are governed by the general admiralty law." In that case a Texas statute authorizing recovery by a mortgagee to whom loss is payable under a fire insurance policy, notwithstanding the insured's breach of warranty, was held inapplicable to a policy covering a vessel on navigable waters. The Court said: "It was a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas."

That principle was not changed by the McCarran Act, 15 U. S. C. A. 1011, *et seq.* That Act was passed to meet the *South Eastern Underwriters Association Case,* 322 U. S. 533, and was never intended to validate state laws contravening provisions of the constitution other than the commerce clause, or violative of federal statutes other than interstate commerce. *Prudential Insurance Company vs. Benjamin,* 328 U. S. 408.

The Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute, 46 U. S. C. A. Sec. 183; it cannot be given the practical effect of preventing the shipowner from protecting himself against liability to an extent that includes his interest in the vessel and her freight. This principle seems to me to be settled by the opinion of the Supreme Court in *The City of Norwich,* 118 U. S. 468, 504, where it was said:

> "We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order

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[fol. 65] to have the benefit of limited liability, but that a contrary result would defeat the principle object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment. Now, to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business."

I am in agreement with what was so well said of that case by the learned district judge:

"It is true that in the City of Norwich the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in the City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance."

[fol. 66] For the foregoing reasons, I respectfully dissent.

[fol. 67] Order Denying Rehearing—October 9, 1952

[Title omitted]

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissents."

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] Supreme Court of the United States, October Term, 1952

No. 498

Maryland Casualty Company, et al., Petitioners,

vs.

Gertrude Picard Cushing, et al.

Order Allowing Certiorari—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.